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ACTION EUR-00

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INFO	LOG-00	NP-00	AID-00	AMAD-00	CIAE-00	INL-00	DODE-00
	DOTE-00	DS-00	EB-00	FAAE-00	FBIE-00	UTED-00	H-00
	TEDE-00	INR-00	IO-00	DCP-00	NSAE-00	OIC-00	NIMA-00
	EPAU-00	PA-00	PER-00	GIWI-00	SCT-00	SSO-00	SS-00
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O 221634Z APR 05  
 FM AMCONSUL STRASBOURG  
 TO SECSTATE WASHDC IMMEDIATE 2600  
 INFO EUROPEAN POLITICAL COLLECTIVE  
 USDOJ WASHDC  
 USMISSION GENEVA

UNCLAS STRASBOURG 0068

STATE FOR EUR/ERA, EUR/PPD, S/WCI, IO/SHA, S/CT

E.O. 12958: N/A  
 TAGS: PREL, PHUM, PTER, KPAO, COE  
 SUBJECT: GUANTANAMO TO BE DEBATED IN STRASBOURG, APRIL 26

REF: 03 STRASBOURG 0093

1. Summary: The PACE will likely vote next week to adopt a non-binding resolution condemning as unlawful the further detention of suspected terrorists and enemy combatants at Guantanamo Bay. The motion, drafted by British MP Kevin McNamara, while not the first to criticize GTMO detention, is certainly McNamara's most complete broadside on the matter. It relies heavily on testimony of ill-treatment and torture by detainees recently released from Camp Delta. If passed, and assuming no harsher amendments, the motion will oblige the Committee of Ministers of the Council of Europe to request that the USG respond to its allegations. There is no great enthusiasm for this exercise within the Council of Europe, given the context of efforts to improve transatlantic relations, and we hope to hear voices raised on the PACE floor acknowledging that Guantanamo is, without PACE prodding, a matter of active consideration in all branches of the USG. End summary

2. On April 26, the plenary of the Parliamentary Assembly of the Council of Europe (PACE) will consider a non-binding Resolution and Recommendation by its Legal Affairs and Human Rights Committee (LAHR) entitled, "Lawfulness of Detentions by the United States in Guantanamo Bay." The author is Kevin McNamara, a lame-duck Labour Party MP, who wrote the PACE's previous Resolution nearly two years

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ago (reftel). This iteration is the result of a Motion (by McNamara) presented to the PACE last May. Its title notwithstanding, the report dwells on the UNlawfulness prevailing at GTMO, on grounds (quoting the report's summary) including the torture and cruel, inhuman or degrading treatment of detainees and violations of rights relating to POW status; the right to judicial review; the right to a fair trial; secret detention and rendition; and violation of the principle of non-refoulement.

### The Recommendation and Resolution

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3. The (operative) draft Recommendation would call upon the inter-governmental Committee of Ministers (CM) of the Council of Europe to transmit the report (once presumably voted on by the PACE) and request that the USG respond. The Recommendation would also call upon the CM to coordinate efforts among the 46 member states to obtain the immediate unconditional release or prompt fair trial of all detainees, and report back to the PACE in six months.

4. The draft Resolution (a sense-of-the-PACE measure) offers its full support to the U.S. in its efforts to fight terrorism, but notes that the USG has betrayed its highest principles in its "zeal" to pursue the war on terror. (NB: Throughout the draft, war-on-terror appears in quotations; see para 7.) In the draft, the PACE calls upon the USG to:

- ? Cease ill-treatment of GTMO detainees;
- ? Punish those responsible for unlawful mistreatment;
- ? Allow detainees to challenge their detentions before competent courts;
- ? Immediately release detainees where evidence is lacking;
- ? Bring to trial other detainees, excluding sentences of death;
- ? Exclude in such trials evidence obtained through ill-treatment;
- ? Cease secret detentions;
- ? Allow access to detainees by family, counsel, consuls, ICRC;
- ? Cease rendition in violation of prohibition on non-refoulement;
- ? Not transfer detainees for diplomatic assurances from countries where they risk ill-treatment;
- ? Cooperate fully with the ICRC;
- ? Ensure that the war on terror is conducted in accordance with international law.

5. In addition, the draft Resolution calls upon the 46 member countries of the Council of Europe to:

- ? Enhance official efforts to protect the rights and ensure the release of their citizens, nationals or former residents;
- ? Respect the presumption of innocence of those released or transferred from GTMO and provide them with legal assistance;
- ? Help those released from GTMO with their reintegration;
- ? Ensure that unlawful detention at GTMO does not jeopardize the

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immigration status of those released;

? Not assist in interrogating GTMO detainees;

? Refuse to comply with USG requests for extradition of terrorist suspects liable to detention at Guantanamo;

? Refuse to comply with USG requests for mutual legal assistance

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regarding GTMO detainees, except to provide exculpatory evidence, or unless in connection with legal proceedings before a regularly constituted court;

? Ensure their territories are not used for secret detention or rendition;

? Take all possible measures to persuade the USG to respect the rights of GTMO detainees under international law.

Explanatory Memorandum (EM): Jurisdiction  
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6. In his copious supporting documentation (with 128 footnotes), McNamara asserts, in his words, that international legal opinion has concluded that U.S. policy and actions in relation to Guantanamo are unlawful. He adds further that U.S. court decisions against the administration have resulted in politically-motivated releases, mainly to European countries. The EM reviews the initial USG arguments against applying Geneva Convention III (on POWs) to al Qaeda and Taliban detainees. McNamara maintains, however, that the international armed conflict in Afghanistan is now over.

7. As for whether the GWOT is an armed conflict, McNamara cites the U.S. District Court ruling in February on the military custody of Jose Padilla: the custody of such a suspected enemy combatant is, quote, a law enforcement matter, not a military matter, end quote. As for jurisdiction over Guantanamo, McNamara contends that the 1966 International Covenant on Civil and Political Rights binds states outside their territory, as have recent decisions in U.S. courts. McNamara also questions the extent of discretion to be offered the Executive under the 2001 Authorization to Use Military Force (AUMF), citing in this instance the Supreme Court judgment in the Hamdi case. To conclude his point that detainees should be treated under criminal, not military, law, McNamara says that the, quote, war on terror, unquote, is no more than a rhetorical expression encompassing U.S. anti-terrorism policy which has no definable conclusion, and that it cannot amount to armed conflict.

Explanatory Memorandum: Ill-Treatment  
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8. Citing, among others, the August 2002 Gonzales-approved memorandum on torture and SecDef April 2003 list of counter-

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resistance techniques, McNamara tries to show that official U.S. guidance seemed to permit and, quote, even encourage abuse. McNamara relies on testimony from former British GTMO detainees to demonstrate that, quote, such practices actually occurred, end quote. At a hearing before the LAHR Committee in Paris last December, Jamal Al Harith described 15-hour interrogation sessions, including a severe beating by the Extreme Reaction Force when he refused an unidentified injection. This same occurred to Shafiq Rasul, Asif Iqbal and Ruhel Ahmed, notes McNamara, according to their cageprisoners.com website. Another British detainee cited by McNamara, Moazzem Begg, claims to have "partially witnessed" the killing of two detainees by U.S. soldiers.

9. The LAHR asked the 46 member countries of the CoE to answer a questionnaire, of which 30 responded. Of these, seven claimed to have had detainees at GTMO, and apparently none stated there had been abuses. Nevertheless, McNamara puts a lot of store in press reports and collected testimonials to conclude that, quote, there can be no doubt that most, if not all detainees are subjected to cruel, inhuman and degrading treatment and punishment, and that such mistreatment is systematic and, indeed, a result of official policy. Furthermore, given the duration and severity, in many cases it amounts to torture, as defined under international law. The frequency of incidents amounting to torture indicates that it is systematic and suggests strongly that knowledge of and responsibility for torture extends far up the chain of command, and may result directly from policy decisions taken at the highest level, end quote.

Comment

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10. According to LAHR staff, no amendments have yet been tabled; however, there is talk of one suggesting that a PACE delegation travel to the U.S. to investigate and/or demarche. One former member of PACE, French UMP Senator Jean-Louis Masson, last summer tried to shortcut further PACE debate and appealed directly to the CoE

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Committee of Ministers to suspend the permanent observer status of the U.S. with the CoE. His initiative did not go far; however, should such an idea be presented and adopted in amendment form next week, it will be a clear indication of the depth of feeling in Europe about GTMO. With or without amendments, the McNamara report is likely to be accepted by a substantial majority. His report in June 2003 passed with only one opposing vote (from a Polish parliamentarian).

11. Whatever the merits of McNamara's arguments about the (military or non-military) nature and timeline of the GWOT, much of his

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evidence seems derived from U.S. Court cases, Executive Orders, FBI memos, etc., which would suggest that the USG's various branches have the matter well under consideration. We will be attentive at next Tuesday's plenary debate (and pleasantly surprised) to see if any PACE parliamentarians suggest that U.S. "domestic remedies" be allowed to run their course. But as the PACE is wont to do in matters related to perceived unilateral American foreign policy in recent years, they will proceed with the debate, as one political scientist told us, on the basis of high moral principles they are compelled to reiterate.

12. Despite letting it proceed, the PACE leadership is not enthralled with this report about the U.S., given its coming at a time when concerted efforts are being made to improve transatlantic relations. We note that the Legal Affairs and Human Rights Committee, meeting in Paris in early March, went out of its way to praise the U.S. Supreme Court Roper v. Simmons decision outlawing the death penalty for minors.

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